82-989

No. -

Office - Supreme Court
FILED
NOV 23 1982
ALEXANDER L. STEVAS,
CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

LUIGI MANOCCHIO,
PETITIONER,

v.

STATE OF RHODE ISLAND,
RESPONDENT.

Petition for Writ of Certiorari to the Supreme Court of Rhode Island.

ANTHONY M. TRAINI,
LEPPO & TRAINI,
240 Commercial Street,
Boston, Massachusetts 02109.
(617) 742-1213

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Table of Contents.

Opinion below	1
Statement of grounds for appeal	2
Constitutional provisions	2
Statement of the case	4
Stage at which federal questions raised	7
Argument	7
Conclusion	13
Appendix	1a

Table of Authorities Cited.

Cases.

Daniel v. Louisiana, 420 U.S. 31 (1975)	9
Duren v. Missouri, 439 U.S. 357 (1979)	9
Lee v. Missouri, 439 U.S. 461 (1979)	9
Linkletter v. Walker, 381 U.S. 618 (1965)	8, 9, 10
Mapp v. Ohio, 367 U.S. 643 (1961)	8, 9
Michel v. Louisiana, 350 U.S. 91 (1955)	11, 12
Norton v. Shelby County, 118 U.S. 425 (1886)	8
Peters v. Kiff, 407 U.S. 493 (1972)	10
State v. Barton, 424 A.2d 1033 (1980)	13
State v. Barton, 425 A.2d 541 (1981)	13
State v. Barton, 427 A.2d 1311 (1981)	13
State v. Byrnes, 433 A.2d 658 (1981)	13
State v. Jenison and Cory, 405 A.2d 3 (R.I. 1979)	5, 6, 7, 8, 9 et seq.

State v. Luigi Manocchio, 448 A.2d 761 (R.I. 1982) 1
State v. Morin, 422 A.2d 1255 (1980) 12
State v. O'Coin, 417 A.2d 310 (R.I. 1980) 5, 6, 7, 9, 10 et seq.
State v. Patriarca, 112 R.I. 14, 308 A.2d 300 (1973) 4
State v. Rohelia, 428 A.2d 1064 (1981) 13
Taylor v. Louisiana, 419 U.S. 522 (1975) 5, 9, 10, 11

STATUTES.

United States Constitution
Fifth Amendment 2, 6
Sixth Amendment 2, 6
Fourteenth Amendment (Section I) 3, 6, 9
28 U.S.C. § 1257(3) 2
Rules of the United States Supreme Court
Rule 17.1(b) 2
Rule 17.1(c) 2
Rhode Island Constitution
Article I, § 10 3, 6
Rhode Island Superior Court Rules of Criminal Procedure, Rule 12(b)(3) 5, 11

MISCELLANEOUS.

1 Blackstone, Commentaries 69 (15th ed. 1809) 8
LSA-R.S. § 15:202 12

Questions Presented.

1. Does a criminal defendant, indicted in a capital case in 1969, have a right, whether substantive or procedural, under the Fifth, Sixth, and/or Fourteenth Amendments to the United States Constitution, or under Article I, § 10 of the Rhode Island Constitution, to challenge the composition of the grand jury that returned the indictments, and, concomitantly, a right to indictment by a constitutionally composed grand jury, where the Rhode Island Supreme Court held in 1979 that all state grand juries empanelled after January 21, 1975 were unconstitutionally composed within the meaning of *Taylor* v. *Louisiana*, 419 U.S. U.S. 522 (1975), but where the case was pending trial on the date [January 21, 1975] of the *Taylor* v. *Louisiana*, *supra*, decision?

2. If the defendant has such a right as described above in question one (1), can that right be waived at all, and, if so, does the defendant waive such right by voluntary absence from the jurisdiction prior to arraignment?

No. - .

In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

LUIGI MANOCCHIO,
PETITIONER,

v.

STATE OF RHODE ISLAND,
RESPONDENT.

Petition for Writ of Certiorari to the Supreme Court of Rhode Island.

Petition for Writ of Certiorari.

Petitioner prays that a writ of certiorari issue to the Supreme Court of Rhode Island, to review said court's erroneous decision of federal constitutional questions. Denial of this petition will subject the petitioner to a criminal trial for a capital offense pursuant to unconstitutional grand jury indictments.

Opinion Below.

The opinion of the Rhode Island Supreme Court is reported *sub nom. State* v. *Luigi Manocchio*, 448 A.2d 761 (R.I. 1982), and is reproduced in the appendix at 1a, *infra*.

Statement of Grounds for Appeal.

The decision of the Rhode Island Supreme Court was entered on July 23, 1982. The petitioner filed a petition to reargue on July 29, 1982. The petition for reargument was denied on September 23, 1982.

The petitioner has no avenue of appeal available except to this Honorable Court.

Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1257(3), and the Rules of the United States Supreme Court 17.1(b) and (c).

Constitutional Provisions.

United States Constitution.

The Fifth Amendment to the Constitution of the United States provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RHODE ISLAND CONSTITUTION.

Article I, § 10.

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusations, to be confronted with the witnesses against him, to have compulsory process for obtaining them in his favor, to

have assistance of counsel in his defense, and shall be at liberty to speak for himself; nor shall he be deprived of life, liberty, or property, unless by the judgment of his peers, or the law of the land.

Statement of the Case.

The petitioner, Luigi Manocchio, was indicted on August 14, 1969, for conspiracy to murder and two counts of accessory before the fact to murders committed in April, 1968. The original proceedings, including what took place in the petitioner's absence, undisputed in *State* v. *Patriarca*, 112 R.I. 14, 308 A.2d 300 (1973), are as follows:

The murders in this case were committed on April 20, 1968. The indictments were not returned until June 2, 1969, fourteen months later. The petitioner here is not alleged to have fled until August of 1969. Five defendants named in the indictments — Patriarca, Fairbrothers, Lerner, Rossi and Sciarra — were charged with conspiracy to murder one of the victims (Marfeo) in indictment numbered 69-769; Patriarca and Sciarra were charged in indictment numbered 69-767 with being accessories to that murder, while Lerner, Fairbrothers and Rossi were charged in that same indictment with the murder itself. In the third indictment, 69-768, Patriarca and Sciarra were again charged with being accessories, this time to the murder of the other victim (Melei), while Lerner, Rossi and Fairbrothers were again charged with the murder itself. Two other defendants, Manocchio (the petitioner here) and Vendituoli were charged as co-conspirators in the conspiracy indictment (69-769) and as accessories in the other two indictments (69-767 and 69-768), but were referred to, respectively, as Richard Roe and William Doe throughout the trial,

but were both absent from the jurisdiction at the time of the first trial.

In the first trial, in 1970, the jury found only Lerner guilty of murder on the two substantive indictments, but could not reach any verdict as to any of the other defendants on those two indictments after three days of deliberations. The jury did find all the defendants guilty of the conspiracy indictment.

At the second trial, in 1971, the defendants as to whom verdicts could not be reached at the 1970 trial were retried together (but without Patriarca, whose case had been severed) on the same charges as in the 1970 trial, with one important change: by the time of the 1971 trial, Vendituoli had returned to Rhode Island, been arraigned, and went to trial with the others in 1971. At this trial, all the defendants were found not guilty of the murder and accessory charges. The State thereafter declined to prosecute Vendituoli on the conspiracy charge. At a third trial, in 1972, Patriarca was individually retried on the accessory charges and acquitted.

The grand jury which indicted him excluded members of the college and university academic community. The petitioner voluntarily absented himself from Rhode Island from approximately August 1969, to July 1979. On July 6, 1979, the petitioner voluntarily appeared, was arraigned, and entered a plea of "not guilty". The petitioner then filed a timely motion to dismiss the indictment in conformity with Rhode Island Superior Court Rules of Criminal Procedure 12(b)(3). On August 1, 1979, in *State* v. *Jenison and Cory*, 405 A.2d 3 (R.I. 1979) the Rhode Island Supreme Court held the state grand jury selection system unconstitutional within the meaning of *Taylor* v. *Louisiana*, 419 U.S. 522 (1975). On June 11, 1980, the Rhode Island Supreme Court held in *State* v. *O'Coin*, 417 A.2d 310 (R.I. 1980) that any indictment returned after the date of *Taylor* v. *Louisiana* [January 21, 1975], was invalid and that no conviction based on any such

indictment which was not final by June 11, 1980 could stand. After hearing, the Rhode Island Superior Court certified the following three questions of law to be determined by the Supreme Court of Rhode Island:

> "1. Does a defendant indicted in 1969 have a right, whether it be contained in the fair and impartial jury trial clause or the confrontation clause of the Sixth Amendment to the United States Constitution, or in the due process clauses of the Fifth and/or Fourteenth Amendments to the United States Constitution, or in the equal protection clause of the Fourteenth Amendment to the United States Constitution, or in the provisions of Article I, section 10 of the Constitution of the State of Rhode Island, to challenge the composition of the grand jury that returned the indictment?
> "2. If the defendant has such a right as described in Question 1 above, to challenge the composition of the grand jury that returned the indictment, does he waive that right by voluntarily absenting himself from the jurisdiction prior to arraignment and trial?
> "3. Is a defendant entitled to the benefit of the retroactive application of the [Rhode Island Supreme] Court's decision in the cases of *State* v. *Jenison* and *State* v. *Cory*, notwithstanding that Court's decision in *State* v. *O'Coin*, if the defendant otherwise meets Federal or State criteria for retroactive application of a decision conferring substantive due process rights upon defendants?"

Based upon these questions, the Rhode Island Supreme Court issued its opinion on July 23, 1982. The Court answered Questions One (1) and Three (3) negatively and did not reach Question Two (2). On July 29, 1982 the petitioner filed a petition for re-argument, which petition was denied on September 23, 1982.

Stage at Which Federal Questions Raised.

By way of petitioner's motion to dismiss the indictments filed in the Superior Court of Rhode Island, the federal questions were first raised at the trial court level, after arraignment but before jeopardy attached by way of trial. By way of certification, the questions were also raised in the Rhode Island Supreme Court.

Argument.

The opinion of the Rhode Island Supreme Court p. 1a, *infra*, misconstrued its own two-prong test of *State* v. *O'Coin*, 417 A.2d 310 (1980), in its inapplicability to the facts of the present case. At p. 6a, *infra*, of said opinion the Court stated: "As noted, *O'Coin* set forth a two-pronged test for the retroactive application of *Jenison*. To avail oneself of a *Jenison* challenge, a defendant must satisfy both prongs of the test."

The petitioner contends, that *State* v. *Jenison*, 405 A.2d 3 (R.I. 1979), not *State* v. *O'Coin*, 417 A.2d 310 (R.I. 1980), is the generally applicable case, and that its applicability is *restricted* by *O'Coin only* if the two-prong test is met. Therefore, it is *O'Coin* that is inapplicable to the instant case, and it is unnecessary to reach the question of retroactivity at all. This is true because it is the *finality of conviction* that determines whether retroactivity is in issue. There is no question that any case that is pending when a new constitutional standard is announced and has a bearing on the case, is subject to that constitutional standard's being *currently* applied, *not* retroactively applied.

In *Linkletter* v. *Walker*, 381 U.S. 618, 622 n.5 (1965), this was exactly the question faced by this Honorable Court, wherein "final conviction" was determined to mean that any available appeals had been exhausted or had lapsed.

The rationale for the opinion in *Linkletter* is peculiarly applicable to the instant case. In *Linkletter*, this Court drew for its basis on the historical rule expounded by Blackstone (1 Blackstone, Commentaries 69 (15th ed. 1809)) and held to be the law in *Norton* v. *Shelby County*, 118 U.S. 425, 442 (1886):

> [that unconstitutional action] confers no rights; it imposes no duties; it affords no protection; it creates no office; *it is, in legal contemplation, as inoperative as though it had never been passed.* (Emphasis added.)

Exactly the same point is applicable here. When the Rhode Island Supreme Court held in *State* v. *Jenison*, *supra*, that the grand jury selection process was unconstitutional, it was as though the exclusion provision of the Rhode Island Constitution had never existed except with respect to cases that had already been *finally decided* prior to the provision's being held unconstitutional. (See, *Linkletter*, *supra*, at 381 U.S. 636.)

In considering the effect of retrospective application of *Mapp* v. *Ohio*, 367 U.S. 643 (1961), this Court in *Linkletter* said

> [t]he thousands of [search and seizure] cases that were *finclly decided* on [the law as it existed prior to *Mapp*] cannot be obliterated. . . . Here "prior determinations *deemed to have finality* and acted upon accordingly" have "become vested." (Emphasis added.)

Linkletter, 381 U.S. at 636.

This is again particularly apposite to the instant case because *Mapp* presented a situation where a right was found to exist in the due process clause of the Fourteenth Amendment to the United States Constitution. Therefore, the same considerations raised in *Linkletter* are relevant here. And, as was said in Linkletter, "[i]t was the judgment of this Court that changed the rule and the date of that opinion is the crucial date." 381 U.S. at 639.

So too with the present case. The rule was changed by the decision of the Rhode Island Supreme Court in *Jenison*, *supra*, on August 1, 1979. Therefore, that is the crucial date. As long as any conviction had not become final by August 1, 1979, the new rule should be currently applicable. *Linkletter*, *supra*. In the present case, not only has any conviction not become final, *there is no conviction at all.* In fact, the case has not even been tried.

The procedure that should be followed in this case is that the indictments should be dismissed and the matter presented to a properly constituted grand jury for re-indictment. (There is no basis for, and the petitioner does not here assert, that re-indictment under these circumstances is barred by any valid double jeopardy claim.) Lest the issue be misconstrued, it should be noted that all the petitioner seeks is enforcement of the right to have probable cause, if any, found by a constitutionally composed grand jury. The application of the *O'Coin* decision is therefore questionable, because the *Linkletter* line of cases would, in effect, consider *Jenison* applicable to any case *pending when the new constitutional rule is announced.* (This is essentially the same reasoning used in *Taylor* v. *Louisiana*, 419 U.S. 522, (1975); *Daniel* v. *Louisiana*, 420 U.S. 31 (1975); *Lee* v. *Missouri*, 439 U.S. 461 (1979); and *Duren* v. *Missouri*, 439 U.S. 357 (1979).)

The clear import of the requirements of any "eligibility test" is simple: if there is *no* [final] conviction then the question

of retroactivity is not reached, and the new *constitutional rule applies automatically.*

Under petitioner's theory, *Jenison* should apply to all cases *pending* at the time that *Jenison* was decided. If this Court finds that in fact *State* v. *Jenison* merely restated the law as it was established in *Taylor* (v. *Louisiana*, 419 U.S. 522 (1975)), *State* v. *O'Coin*, 417 A.2d 310 at 312) then *Jenison* is properly applicable to any case in which a conviction was not final on the date *Taylor* was announced (January 21, 1975).

According to the applicable federal case law, as relied upon by the Rhode Island Supreme Court in *O'Coin*, it is the date of the decision announcing the constitutional principle that is crucial, *not* the date of the decision that announces the retroactivity application. (See, *Linkletter* v. *Walker*, 381 U.S. at 639, for example.) Therefore, *O'Coin* is inapplicable to the instant case. The correct application of *Jenison* depends *only* on whether the date of *State* v. *Jenison* or the date of *Taylor* v. *Louisiana* is the controlling date.

The Rhode Island Supreme Court has ruled that a defendant has the right to challenge the composition of the indicting grand jury. *State* v. *Jenison*, 405 A.2d 3 (1979). Indeed, the right to be tried by a jury drawn from a fair and impartial cross-section of the community admittedly is an equal protection and due process right. *Peters* v. *Kiff*, 407 U.S. 493, 502 (1972). Furthermore, the right to a properly composed grand jury is a fundamental aspect of the right to jury trial guaranteed by the Sixth Amendment. *Taylor* v. *Louisiana*, 419 U.S. 522 (1975).

In *State* v. *Jenison*, *supra*, the Rhode Island Supreme Court concluded: "[A] state electing to use the grand jury system must abide by the requirements of due process in assuring that the selection process draws jurors from a fair cross-section of the community." 405 A.2d at 7.

Relying on the rule of *Taylor* v. *Louisiana*, *supra*, 419 U.S. at 530 that court went on to state that to exclude a "[c]ognizable class playing a major role in the community, without a rational reason therefor, impermissibly offends the fair cross-section requirement. . . ." *State* v. *Jenison*, *supra*, 405 A.2d at 8.

Applying these principles, the Rhode Island Supreme Court determined that the system of automatically excluding from the grand jury venire members of the college and university academic community who were entitled to exemption was unconstitutional, *id.* at 10, and that indictments handed down, "by a grand jury composed in violation of constitutional requirements cannot stand." *Id.* This Honorable Court has ruled on the same issue in *Taylor* v. *Louisiana*, *supra*.

Therefore, the denial of the petitioner's right to challenge the unconstitutional composition of the grand jury that indicted him is severely prejudicial, and repugnant to the federal constitution, and the decisions of this Court.

The Rhode Island Supreme Court was also in error by failing to make a ruling that the petitioner did not — and in fact could not — waive his constitutional right to challenge the composition of the grand jury that indicted him.

In *Michel* v. *Louisiana*, 350 U.S. 91, 99 (1955), this Court held that "a constitutional right may be forfeited . . . by the failure to make a timely assertion of the right". The petitioner concurs with this decision and indeed did make a timely assertion of that right consistent with the applicable Rule of Criminal Procedure, Rhode Island Superior Court Rules of Criminal Procedure 12(b)(3).

A reading of *Michel* v. *Louisiana*, *supra*, clearly supports the petitioner's position here, since that case discloses that the underlying basis for enforcement of the state [Louisiana] procedural rules was to *determine the controversy prior to trial*.

In *Michel* and its consolidated companion case, the decision was based upon the fact that "Louisiana requires that objections

to a grand jury be raised *before the expiration of the third judicial day following the end of the grand jury's term or before trial, whichever is earlier.*" (Footnote omitted) (emphasis added). 350 U.S. at 92.

It is undisputed that Rhode Island requires that a motion to dismiss be made no later than twenty-one days after a plea is entered, or in such further time as the court allows.

This Court's interpretation of the applicable state procedural rule in *Michel, supra,* was made in conjunction with another section of the state criminal code which "provides that in any case such objections must be made *before* arraignment." *Michel, supra,* at 350 U.S. 93 (emphasis added). Rhode Island procedure *specifically provides* that these objections be made *after* arraignment. Furthermore, the Louisiana statute *expressly* provided that if the objection was not raised by such procedure, "all such objections shall be considered as waived and shall not afterwards be urged or heard." LSA-R.S. § 15:202, *Michel, supra,* at 350 U.S. 92-93, n.1. Rhode Island has no such express waiver provision, and *does not* require challenge before arraignment, as Louisiana law does.

Clearly, the risk of having to *overturn* an otherwise valid conviction and to *re-try* a defendant years later outweighs the defendant's voluntary waiver of a valid procedural rule having a legitimate purpose. The Court here is not confronted with this issue, since there has not yet been a trial in this case. It is appropriate to note that, in holding that there was a waiver of the right to challenge the grand jury in *Michel,* this Court also stated "[t]his is not to say that the act of fleeing and becoming a fugitive deprives one of federal rights." *Michel, supra,* 350 U.S. at 98.

Research has disclosed no Rhode Island case which enforces a waiver for failure to file a pretrial motion *before* arraignment. In the "waiver cases" decided by the Rhode Island Supreme Court, such as *State* v. *Morin,* 422 A.2d 1255 (1980);

State v. *Byrnes*, 433 A.2d 658 (1981); *State* v. *Barton*, 424 A.2d 1033 (1980); *State* v. *Barton*, 425 A.2d 541 (1981); and *State* v. *Barton*, 427 A.2d 1311 (1981), the waiver was enforced because the defendants failed to file the motion before trial *and* raised the issue for the first time on appeal. In cases like *State* v. *O'Coin*, *supra*, and *State* v. *Rohelia*, 428 A.2d 1064, 1065 (1981), the defendants filed the motion before trial, and the question of timeliness was in the discretion of the trial judge. In both cases, the indictments were necessarily dismissed.

For these reasons the Rhode Island Supreme Court *should not have refused to rule* on the crucial question of the petitioner's "waiver" or "non-waiver" of his constitutional right to challenge the composition of the indicting grand jury.

Conclusion.

Certiorari should be granted to review the decision of the Rhode Island Supreme Court, and that decision should be reversed, and the case remanded to the Rhode Island Superior Court with instructions that the indictments be dismissed.

Respectfully submitted,

ANTHONY M. TRAINI,
LEPPO & TRAINI,
240 Commercial Street,
Boston, Massachusetts 02109.
(617) 742-1213